

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COLTON SIMPSON, } Case No. EDCV 11-1312 SVW
Petitioner, } (PJW)
v. } ORDER ACCEPTING IN PART
MATTHEW CATES, SECRETARY } REPORT AND
OF CDCR, AND SCOTT } RECOMMENDATION OF
MCEWAN, WARDEN, } UNITED STATES
Respondents. } MAGISTRATE JUDGE AND
SEPARATE ORDER

Pursuant to 28 U.S.C. § 636, the Court reviewed the petition, the record, the Report and Recommendation of the United States Magistrate Judge, and Petitioner's Objections to the Report and Recommendation. The Court accepts the findings and recommendation of the Magistrate Judge contained in Parts I, II, III, IV(A), IV(C) through IV(L), and V of the Report and Recommendation. Although the Court agrees with the Report and Recommendation's conclusions in Part IV(B), the Court files a separate order replacing this section.

1 **B. Petitioner's Claim that the Police Procedure Used to Identify Him Created a**
 2 **Substantial Likelihood of Misidentification Does Not Warrant Habeas Relief**

3 **1. Analysis**

4
 5 *Perry v. New Hampshire* established a two-step inquiry for determining whether a
 6 pretrial identification violated the Due Process rights of the person identified. *Perry v. New*
 7 *Hampshire*, 132 S. Ct 716, 733 (2012). First, a court determines whether the police used
 8 identification procedures that were unnecessarily suggestive. *Id.* In the second step, a court
 9 examines the totality of the circumstances to determine whether there was a substantial
 10 likelihood of misidentification. *Id.* Courts consider five factors while assessing the totality of
 11 the circumstances: “[1] the opportunity of the witness to view the criminal at the time of the
 12 crime, [2] the witness’ degree of attention, [3] the accuracy of the witness’ prior description of
 13 the criminal, [4] the level of certainty demonstrated by the witness at the confrontation, and [5]
 14 the length of time between the crime and the confrontation.” *Neil v. Biggers*, 409 U.S. 188, 199-
 15 200 (1972).

16 Here, the procedure used by Investigator Felt did not violate Petitioner’s constitutional
 17 rights. Assuming *arguendo* that the identification procedure was unnecessarily suggestive
 18 because it involved only one photograph and was accompanied with information linking
 19 Petitioner to the rented Taurus, *see Simmons v. United States*, 390 U.S. 377, 383 (1968), the
 20 procedure still did not create a substantial likelihood of misidentification under the totality of the
 21 circumstances.

22 Admittedly, the first factor suggests unreliability. The deputies testified that they
 23 observed Petitioner twice during the car chase — they both saw him in their rearview mirror
 24 during the chase, and Pierson saw Petitioner exiting his car. The rearview mirror does not offer
 25 an ideal vantage point, especially during a high-speed pursuit. And Petitioner was only
 26 observable for a few seconds (albeit in broad daylight) when he got out of his car. Although
 27 adequate, the officers’ opportunity to view Petitioner was less than optimal.

28 The remaining factors, in contrast, indicate that the identification was reliable. The

1 officers' training ensures that they paid sufficient attention to Petitioner's appearance. *See*
 2 *Manson v. Brathwaite*, 432 U.S. 98, 115 (1977). Their identification was immediate and
 3 unequivocal. *See Hunter v. McCollum*, No. 07-21372CIV, 2011 WL 4552401, at *15 (S.D. Fla.
 4 Sept. 29, 2011). And they identified Petitioner while their memories were fresh³ — within
 5 twenty-four hours of observing him. *See United States v. Maloney*, 513 F.3d 350, 356 (3d Cir.
 6 2008).⁴

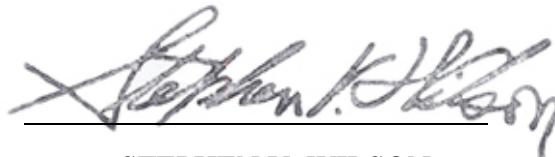
7 Given this balance, the state court did not unreasonably apply clearly established
 8 Supreme Court law. Indeed, the circumstances here did not carry a greater risk of
 9 misidentification than those found reliable by the Supreme Court and Ninth Circuit in other
 10 cases. *See Perry v. New Hampshire*, 132 S. Ct. 716 (2012) (permitting identification even
 11 though eyewitness saw a single person standing next to a police officer at night from a
 12 significant distance and was unable to identify the same person in a six-person line up at a later
 13 date); *Holden v. State of Alaska*, 21 F.3d 1113 (9th Cir. 1994) (permitting identification despite
 14 procedure tainted by police comments because witness made identification within hours of
 15 assault, had good look at assailant, and was focused on assailant). Nor were they as problematic
 16 as identifications ruled inadmissible. *See Foster v. California*, 394 U.S. 440 (1969) (holding
 17 identification inadmissible because defendant was significantly shorter than other members of a
 18 line-up, was only person re-used through multiple line-ups, and police officers pushed for his

20
 21 ³ Petitioner questions the accuracy of the officers' recollections by citing seemingly
 22 contradictory portions of their testimony. He points out that Marks never observed
 23 Petitioner leave his vehicle, but Pierson testified that he did. The officers, however,
 24 explained this incongruity: Marks testified that he was trying to pull the shotgun from the
 25 car's holster (so his head was turned away) when Pierson says Petitioner left his vehicle.
 26 Thus, Marks offered a reasonable explanation for why he, unlike Pierson, never saw
 27 Petitioner outside his vehicle. As a result, the Court lacks any evidence suggesting the
 28 officers could not accurately recall what they observed.

29
 30 ⁴ The other factor — the accuracy of the witnesses' descriptions — is neutral. The officers'
 31 descriptions of Petitioner were accurate, but they were unspecific and failed to mention
 32 identifying features like the scar on Petitioner's head.

1 identification despite tentative statements from the victim); *Heath v. Hill*, 397 F. App'x 308 (9th
2 Cir. 2010) (finding identification inadmissible after impermissibly suggestive procedure because
3 only *Biggers* factor supporting reliability was witness' certainty). Therefore, Petitioner failed to
4 carry his burden under AEDPA, and the Court cannot afford him habeas relief on this claim.

5
6 Dated: April 28, 2015
7
8
9



STEPHEN V. WILSON

10 United States District Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28